No. 82-1150

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

HOWARD ELLIS, et al.,

Petitioners,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, et al.,

Respondents.

ALLEN L. FAILS, et al.,

Petitioners,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. Whether the United States Constitution and the Railway Labor Act permit a labor ogranization to collect and spend compulsory union dues and agency fees, over the objection of employees, for purposes other than the negotiation and adminstration of a collective bargaining agreement between that labor organization and the employer of those employees and the adjustment of grievances under that collective bargaining agreement?

2. Whether a labor organization, which owes a fiduciary obligation to dissenting employees not to misspend their compulsory dues and fees for impermissible purposes, must show by clear and convincing evidence from records maintained in accordance with generally accepted accounting principles the amounts spent from those dues and fees for contract negotiation and administration and grievance adjustment?

3. Where a labor organization collects and spends compulsory union dues and agency fees of employees for purposes other than the negotiation and administration of a collective bargaining agreement and the adjustment of grievances between that labor organization and the employer of those employees, does a scheme which allows for the collection, expenditure, and subsequent union-determined rebate of a portion of dissenting employees' dues or fees used for purposes other than contract negotiation, contract administration and grievance adjustment satisfy the requirements of the Railway Labor Act and the first amendment to the Constitution of the United States?

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Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express & Station Employes System Board of Adjustment No. 451, Air Transport Division
Skyliner Lodge Local 3001
Skyharbor Lodge Local 3014
Arrowliner Lodge Local 3049

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OPINIONS BELOW

The opinion of the court of appeals (App. Cert. 1a-16a),[1] is reported at 685 F.2d 1065 (9th Cir. 1982). The findings of fact and conclusions of law of the United States District Court for the Southern District of California granting petitioners' motion for summary judgment as to liability is reported at 78 Lab. Cas. ¶ 11,290 (S.D. Cal. 1976) (J.A.III 231-40). The district court's summary judgment order was later amended. The order amending the summary judgment is reported at 79 Lab. Cas. ¶ 11,765 (S.D. Cal. 1976) (J.A.III 244-45).

A trial on the damages issue was held in August, 1978. The additional findings of fact and conclusions of law are reported at 88 Lab. Cas. ¶ 11,986 (S.D. Cal. 1980) (J.A.IV 365-69). The final judgment was entered on July 9, 1980, and is neither officially nor unofficially reported (J.A.IV 370-96).

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was filed on September 3, 1982 (App. Cert. 1a). The petition for a writ of certiorari was timely filed on January 7, 1983, and was granted on April 18, 1983. Jurisdiction of this court is conferred under 28 U.S.C. § 1254(1) (1976).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions are those of Section 2, Eleventh, 45 U.S.C. § 152, Eleventh (1976), of the Railway Labor Act, as amended. The pertinent provisions of the Constitution of the United States are U.S. Const. amend. I and U.S. Const. amend. V (App. Cert. 36a).

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[1] "J.A." refers to portions of the Joint Appendix. Each reference will be followed by volume number and the page of the Joint Appendix at which it appears. "App. Cert." refers to portions of the Appendices to Petition for Writ of Certiorari separately presented pursuant to Sup. Ct. R. 21.1(k). "Supp. App." refers to portions of the Appendix to the Supplemental Brief to Petition for Writ of Certiorari filed pursuant to Sup. Ct. R. 22.6. "CR" refers to the docket control numer in the trial court clerk's record. All references will be to entries in the *Ellis v. Brotherhood of Ry., Airline & S.S. Clerks, infra*, civil docket sheet. "RT at __" refers to the trial court reporter's transcript, with the date of the transcript preceding each reference. "Pl. Ex." refers to trial exhibits introduced by the plaintiffs. "Def. Ex." refers to trial exhibits introduced by the defendants.

STATEMENT OF THE CASE

The Brotherhood of Railway, Airline and Steamship Clerks ("BRAC") is no stranger to union spending challenges. BRAC was a principal defendant in *International Association of Machinists v. Street*, 367 U.S. 740 (1961), and the lead defendant in *Brotherhood of Railway Clerks v. Allen*, 373 U.S. 113 (1963).[2]

BRAC is an international union representing employees in the United States and Canada for collective bargaining over wages, hours and working conditions (J.A.III 232, 257). As of December 31, 1977, BRAC and its subordinate bodies comprised a total membership of 202,582, of whom 19,915 were in Canada. Of BRAC's 202,582 members, 143,154 were active members. Of the total union membership, the air transportation industry accounts for a mere 5% and the railroad industry accounts for approximately 85% (J.A.III 257).

Plaintiffs in these cases are present or former employees of Western Airlines, Inc., a corporation engaged in the transportation of passengers and freight in interstate commerce. (J.A.III 232-33). Until decertified by the National Mediation Board, BRAC was the exclusive bargaining representative of the clerical employees of Western Airlines, including plaintiffs (J.A.III 232, 257).[3]

In 1971, the collective bargaining agreement required employees hired after October 27, 1966 to become and remain formal members of BRAC as a condition of continued employment. Employees hired by Western Airlines prior to October 27, 1966 and who had refused to join BRAC were not required to become formal members. In 1975, after plaintiffs attacked the formal membership requirement in their motion for summary judgment (CR 121, Memorandum of Points and Authorities in Support of

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[2] *Street* was filed on June 5, 1953, and final judgment was not entered until December 29, 1964, *sub nom. Looper v. Georgia S. & F. Ry.*, No. 16,537 (Ga. Super. Ct. Dec. 29, 1964). BRAC was one of the eight defendant unions party to the stipulation incorporated as part of the final judgment. *Allen* was filed on June 8, 1953, three days subsequent to the filing of *Street*. *Allen v. Southern Ry.*, 249 N.C. 491, 107 S.E.2d 125 (1959). BRAC was one of the two defendant unions against whom final judgment was originally entered by the trial court, *Allen v. Southern Ry.*, 42 L.L.R.M. 2175 (N.C. Super. Ct. 1958), and who appealed that judgment to this Court.

[3] Certification of National Mediation Board, Washington, D.C. in Case No. R-4995, 7 N.M.B. No. 218, July 30, 1980.

Summary Judgment at 4-9), BRAC International President Dennis unilaterally construed its constitution as not requiring union membership (J.A.III 233). Non-members remained obligated to pay fees equal to regular monthly dues and initiation fees charged by BRAC to its members (J.A.III 233, 257-58).

In *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*, No. 73-113-N (S. D. Cal. Filed Mar. 20, 1973) (J.A.I 5-22), the plaintiffs are present or former employees of Western Airlines who were not members of BRAC (J.A.III 233). *Fails v. Brotherhood of Railway, Airline, and Steamship Clerks*, No. 73-118-N (S. D. Cal. Filed Mar. 23, 1973) (J.A.I 78-96), is a class action (J.A.III 233). Its plaintiffs and class members (all of whom are referred to as "plaintiffs") are all members of BRAC who were or are employed by Western Airlines (*Id.*). Each plaintiff sent BRAC a written objection to the use of dues and fees exacted pursuant to the collective bargaining agreement for political, ideological, and non-collective bargaining purposes. None of these letters received a response; many were left unopened (J.A.III 234-35). These cases were consolidated in February, 1974 (J.A.II 171-74).

BRAC's organizational structure is multi-tiered. The Grand Lodge is the umbrella administrative body for all BRAC activities within the United States and Canada. (CR 30, Ex. A at 18; Def. Ex. A at 19-20, admitted Aug. 1, 1978 RT at 6-8). System Board of Adjustment No. 451 is the intermediate administrative body and the primary collective bargaining entity with Western Airlines (J.A.III 232).

Skyliner Lodge Local 3001, Skyharbor Lodge Local 3014, and Arrowliner Lodge Local 3049 are subordinate administrative and collective bargaining entities to System Board No. 451 (*Id.*).[4] At the Grand Lodge, system board and local lodge levels, independent administrative facilities and books and records are maintained (J.A.IV 367-68; Aug. 10, 1978 RT at 1086-88). The California State Legislative Committee was an unincorporated association, subsidiary to and affiliated with BRAC, which had as its purpose, in part, the sponsorship of legislation in California (J.A.III 232).

Between 1971 and 1978, plaintiffs' obligations to BRAC ranged from $11.00 to $17.00 a month. A portion of each month's fees was distributed to the Grand Lodge, the system board and a local lodge. Each local lodge

[4] Hereafter, references to "BRAC" include the Grand Lodge, System Board No. 451 and the local lodges.

sent $.30 per employee a month to the California State Legislative Committee until it was disbanded[5] and thereafter $.30 per employee per month was sent to the Grand Lodge for the support of regional political action committees. (J.A.III 257-58).

Non-Western Airlines employees represented by BRAC in both the United States and Canada have paid less in dues than that charged to plaintiffs; some pay nothing (J.A.III 258, 259-60).

At all pertinent times, BRAC has expended fees collected from plaintiffs for the political, ideological and non-collective bargaining activities enumerated in paragraph 22 of the district court's interlocutory summary judgment of January 21, 1976 (J.A.III 236-37; IV 366-68). The district court held that BRAC's use of plaintiffs' fees for these activities breached BRAC's duty to fairly represent plaintiffs and violated the Railway Labor Act (J.A.III 238-39). Although plaintiffs alleged that BRAC's conduct violated their constitutional rights under the first, fifth, and ninth amendments (J.A.I 12, 86), the trial court did not adjudicate those claims.

A trial on damages was held in August, 1978. In its findings of fact and conclusions of law and final judgment after trial, the court accepted BRAC's allocations of Grand Lodge, System Board 451 and local lodge expenditures (J.A.IV 367-68). The Court found that the maximum amount returnable to any plaintiff after five years of litigation was $352.69 (J.A.IV 373-96).

In BRAC's 1971 constitution, the Grand Lodge monthly legislative fund exaction was $.10 (CR 30, Ex. A at 49-50). Thirty cents a month from dues and fees collected at the local lodge level was paid to the California Legislative Committee (J.A.III 257). A protesting member could obtain dues reduction of $.03-1/3 per month (J.A.III 235). Refunds were refused to plaintiffs (*Id.*). The district court found that this scheme violated BRAC's duty to fairly represent all employees within the Western Airlines bargaining unit. An additional violation was found in its manner of operations (J.A.III 239).

BRAC issued a new rebate scheme through its Policy Statement of 1974 (J.A.III 235). Under that plan, rebates were calculated by the Grand

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[5] The California State Legislative Committee was apparently disbanded in 1975 (*See* Aug. 10, 1978 RT at 1085).

Lodge Board of Trustee, but the scope of refundable expenditures was confined narrowly to include only political expenditures "not germane to collective bargaining" (J.A.I 63-67; CR 30, Affidavit of C. L. Dennis, Ex. B).

In computing rebates, the Board of Trustees reviewed financial statements which could not serve as a basis for calculating BRAC political costs, as BRAC did not record expenditures or activities in that classification. (CR 104, Deposition of Wende at 43-44, 47-48; CR 104, Deposition of Sullivan at 55, 57, 101, 111). Rebates computed under the Policy Statement did not include expenditures from the Grand Lodge Legislative Fund. (CR 104, Deposition of Schraeder at 317). The amount of the rebates computed under the Policy Statement amounted to $.07 per person a month (CR 69, Ex. A at 5).

In January, 1975, the court invalidated this rebate scheme because the "standard for refunds of dues and fees contained within the Policy Statement is erroneous as a matter of law. . . ." (CR 86, J.A.III 260). Nonetheless, five months later the Policy Statement was elevated *verbatim* to the level of a BRAC constitutional amendment (J.A.III 260; CR 155, Ex. S at 451-52).

After plaintiffs filed their motion for summary judgment on August 26, 1975, BRAC scrapped the Policy Statement and adopted the current "political" rebate scheme (J.A.IV 366-67; J.A.-Exhibits 421-24, 425-26, admitted Aug. 1, 1978 RT at 6-8).

The scope of this rebate scheme is limited. It includes only expenditures for elections, legislative lobbying, dues or contributions to other labor organizations and educational groups. It does not include all of the non-collective bargaining and ideological expenditures enumerated in paragraph 22 of the summary judgment (J.A.IV 366). Rebates are computed annually by the Board of Trustees, none of whom is an accountant (CR 67 at 214-15; CR 104, Deposition of Schraeder at 43-44). The records from which the rebates have been computed are not maintained in accordance with generally accepted accounting principles. Although a dissatisfied employee may appeal to a board of review, no member of that board is an accountant. The board is comprised of an ex-politician, a law school dean, and a minister (J.A.IV 366; Def. Ex. CD(1)-(3), admitted Aug. 1, 1978 RT at 6-8). Plaintiffs have no discovery rights before the board of review. The board's function is limited to reviewing the computations made by the Board of Trustees.

SUMMARY ARGUMENT

The existence, operation, and spread of trade unionism is dependent upon the unfettered exercise of first amendment freedoms. Powerful associational ties and commitments are involved in the furtherance of BRAC's goals. Unions are private organizations, and forced financial support for their activities raises the traditional barriers which safeguard first amendment rights. Although Congress authorized compulsory financial support for BRAC, the reach of that compulsion must be measured by the strict scrutiny applied to legislative measures which curb individual freedom in order to accomplish a compelling governmental interest. Issues in this case must be decided in accordance with those strict constitutional standards.

Railway unions such as BRAC were deemed to owe a statutory duty of fair representation to non-members to bargain in their behalf with their employer and to process their grievances. As these responsibilities entailed union expense, Congress was persuaded to allow union shop provisions which require all employees represented by a union to bear a portion of the costs of performing collective bargaining functions. The extent to which payment may be extracted from plaintiffs is measured by the scope of services BRAC is required by the statute to perform. Respect for plaintiffs' first amendment rights precludes charging them for union activities on a broader scale.

Paragraph 22 of the summary judgment found that certain BRAC activities are not chargeable to plaintiffs, as they are not collective bargaining activities. Included among these are a death benefit program, conventions, publications, litigation, social activities and organizing. These BRAC activities are imbued with parochial ideological involvement and political activism. Such activities are not necessary to the proper performance by BRAC of its collective bargaining responsibilities with Western Airlines. Forced financial support by plaintiffs of these activities serves no compelling governmental purpose. Foisting such costs upon plaintiffs derogates their first amendment rights.

BRAC's accounting records were never set up or modified to isolate costs of collective bargaining with Western Airlines. First amendment strictures preclude charging plaintiffs for other union activities. Because of the jeopardy to plaintiffs' rights flowing from union collection and expenditure of their compulsory fees for a variety of institutional, political and ideological programs, BRAC should have been required to establish

the amounts of its chargeable expenditures by clear and convincing evidence. In keeping with that standard of proof, the union's accounting must be done in accordance with generally accepted accounting principles. This requirement is essential for the protection of plaintiffs' first amendment rights, as well as the enforcement of BRAC's admitted fiduciary duty not to misspend wages it has extracted from plaintiffs.

Since the rendition of plaintiffs' spending protests, which were ignored by BRAC, the union has implemented a succession of internally controlled schemes to rebate a portion of its political expenditures. It has continued to collect full fees from plaintiffs, and BRAC itself determines the amount to be rebated. Plaintiffs' constitutional rights to be free from compulsory support of union political and ideological programs are irreparably violated by these forced loans. A union-administered rebate program cannot redress the injuries to plaintiffs' constitutional rights.

ARGUMENT

I.

RAILWAY LABOR ACT AUTHORIZATION OF COMPULSORY UNION FEES MUST BE VIEWED WITH STRICT SCRUTINY AS USE OF THOSE FEES INFRINGES UPON FIRST AMENDMENT RIGHTS.

In 1951, Congress amended the Railway Labor Act, 45 U.S.C. § 151 et seq. (1976), to add Section 2, Eleventh, 45 U.S.C. § 152, Eleventh (1976), at the behest of labor unions. *Street*, 367 U.S. at 750-64. BRAC was among the forceful advocates for the passage of Section 2, Eleventh, through its then president, George M. Harrison, who also served as spokesman for the Railway Labor Executives' Association. *Id.* at 761-63 & nn. 13-14.

Section 2, Eleventh, authorizes agreements between employers and labor unions requiring that all employees represented by a union become a member of the union within a stated period, provided there is no discrimination against the employee and provided that membership is not denied or terminated "for any reason other than failure of the employee to tender the periodic dues, initiation fees and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership." This type of provision is commonly referred to as

a "union shop." By its terms, Section 2, Eleventh, nullifies state laws which prohibit the union shop.

This Court has thrice found the presence of sufficient governmental action under the Railway Labor Act to impose constitutional constraints upon forced fee obligations. *Railway Employes' Department v. Hanson*, 351 U.S. 225, 231 (1956); *Street*, 367 U.S. at 749-50; *Abood v. Detroit Board of Education*, 431 U.S. 209, 218-19 & n. 12, 226 & n. 23 (1977).

This Court held in *Street* as a matter of statutory construction, and in *Abood* as a constitutional principle, that protesting employees cannot be compelled to support a union's political and ideological activities. *Street*, 367 U.S. at 768-69; *Abood*, 431 U.S. at 235-36; *see Allen*, 373 U.S. at 118. Although *Abood* arose in the context of public-sector collective bargaining, the Court expressly held that any "differences between public- and private-sector collective bargaining simply do not translate into differences in First Amendment rights." 431 U.S. at 232. This Court also noted that its previous construction of Section 2, Eleventh, in *Street* was "not without its difficulties" and was undertaken "precisely to avoid the constitutional issues" raised. *Id.* The Court thus has recognized that first amendment principles must confine the reach of Section 2, Eleventh.

Rights guaranteed by the first amendment are of transcendent value and essential to the workings of a free society. *Shelton v. Tucker*, 364 U.S. 479, 485-86 (1960); *Speiser v. Randall*, 357 U.S. 513, 521, 526 (1958); *Thomas v. Collins*, 323 U.S. 516, 529-30 (1945); *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940). While the freedom of association is not explicitly referred to in the first amendment, it has long been held to be implicit in the freedoms of speech, assembly, and petition. It is unquestioned that the first amendment protects the rights of individuals to associate to further their personal beliefs. *Abood*, 431 U.S. at 233; *Elrod v. Burns*, 427 U.S. 347, 355-57 (1976) (plurality opinion); *Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973); *Healy v. James*, 408 U.S. 169, 181 (1972); *Shelton v. Tucker*, 364 U.S. at 485-86; *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-61 (1958).

The first amendment also confers full protection upon expression about governmental affairs and philosophical, social, artistic, economic, literary, or ethical matters, among others. *Abood*, 431 U.S. at 231 & n. 28. Speech does not lose its first amendment protection because money is spent to project it. As stated in *Buckley v. Valeo*, 424 U.S. 1, 22 (1976): "Making a contribution, like joining a political party, serves to affiliate a

person with a candidate. In addition, it enables like-minded persons to pool their resources in furtherance of common political goals." *Accord Abood*, 431 U.S. at 234; *Virginia State Board of Pharmacy v. Virginia Citizens' Consumer Council, Inc.*, 425 U.S. 748, 761 (1976).

In the labor relations context, the first amendment protects the right to discuss and inform others concerning the advantages and disadvantages of labor unions, *Thomas v. Collins*, 323 U.S. at 532, the right to discuss the merits or demerits of a labor dispute, *Virginia State Board of Pharmacy*, 425 U.S. at 762-63 (and cases cited therein), and the right of employees to voice their views individually or collectively to their employer, *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 313 (1979).

The reciprocal rights not to engage in expressive activities and not to associate with others in the espousal of political, philosophical, social, artistic, economic, literary, or ethical beliefs stand with equal dignity beside the right to speak and to associate. *Abood*, 431 U.S. at 234-35; *Wooley v. Maynard*, 430 U.S. 705, 713-15 (1977); *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).

Compelling employees to pay money to a labor organization "has an impact upon their First Amendment interests." *Abood*, 431 U.S. at 222. Whether labor unions benefit or detriment employees is a question over which reasonable minds may differ; and employees may have strong philosophical, ideological, or religious objections to joining unions or to contributing money to them.[6] Employees may also hold sincere objections to the positions taken by a union as their bargaining representative on a variety of issues, including compulsory union membership and financial support, the right to strike, and medical benefits. *Id.* at 222. 225 n. 20.

Under the Railway Labor Act, the representative chosen by a majority of the employes in a craft or class becomes the exclusive representative of all employees in that craft or class. A dissenting employee is forced to abide by the economic ideology that collectivization is the only path to improvements in wages, hours and working conditions. *NLRB v. Allis-Chalmers Manufacturing Co.*, 388 U.S. 175, 180 (1967). The Railway

[6] The Seventh Day Adventist Church is a notable example of a religious body which forbids membership in or financial support for labor unions. *See Gray v. Gulf, Mobile & O. R.R. Co.*, 429 F.2d 1064, 1066 n.4 (5th Cir. 1970), *cert. denied*, 400 U.S. 1001 (1971).

Labor Act thus clothes the union "with power not unlike that of a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates. . . ." *Steele v. Louisville & Nashville Railroad*, 323 U.S. 192, 198, 202 (1944).

Because all compulsory unionism agreements resulting from governmental action have an impact on first amendment rights, the constitutional limitations applicable to those agreements also are to be found in first amendment principles. *See Abood*, 431 U.S. at 233-35. When governmental action impinges upon the full exercise of the freedoms of speech and association, only the presence of a governmental interest sufficiently compelling to survive strict scrutiny will uphold that action. The mere showing of a legitimate governmental interest is not sufficient. At all times, the party seeking to infringe upon those freedoms must assume the burden of demonstrating the presence of the compelling governmental interest, and of showing that the means selected are not susceptible to a less drastic way of satisfying that interest. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786-87 (1978); *Abood*, 431 U.S. at 259-60, 262 (Powell, J., concurring in the judgment); *Wooley v. Maynard*, 430 U.S. 716-17; *Elrod v. Burns*, 427 U.S. at 362-63 (plurality opinion); *Kusper v. Pontikes*, 414 U.S. at 58-59; *Shelton v. Tucker*, 364 U.S. at 488.

In *Hanson, Street,* and *Abood*, the Court determined that there is an important or compelling governmental interest justifying union and agency shop arrangements only "insofar as the service charges are applied to collective-bargaining, contract administration, and grievance-adjustment purposes." *Abood*, 431 U.S. at 232. The procedural posture of those cases made it inappropriate for the Court to draw the line between collective bargaining activities, which are chargeable to dissenters, and other activities which are not. Nor did the Court determine which remedies are required to prevent impermissible infringement of employee first amendment freedoms. However, in addressing these line-drawing and remedy issues, no definition of chargeable costs should be adopted and no remedy approved unless it is narrowly tailored to serve the governmental interest identified in *Hanson, Street*, and *Abood* in the manner least restrictive of employee freedom of association. *See, e.g., Havas v. CWA*, 509 F.Supp. 144, 149 (N.D. N.Y. 1981). The fundamental error committed by the Ninth Circuit in this case is that, unlike other courts which have addressed these two issues, it failed to apply the first amendment "strict scrutiny" test to either issue.

II.

FIRST AMENDMENT PRINCIPLES AND THE LEGISLATIVE HISTORY OF THE RAILWAY LABOR ACT PRECLUDE BRAC FROM CHARGING PROTESTING EMPLOYEES FOR EXPENDITURES WHICH ARE NOT DIRECTLY RELATED TO CONTRACT NEGOTIATION, CONTRACT ADMINISTRATION AND GRIEVANCE ADJUSTMENT.

Relying on *Street*, the district court held that the Railway Labor Act prohibits the use of protesting employees' compulsory dues and fees for a list of "non-collective bargaining activities" enumerated in paragraph 22 of its interlocutory summary judgment, as amended by its order entered on November 29, 1976 (J.A.III 236-37, 238-39, 244-45).[7]

BRAC's appeal to the Ninth Circuit accepted the non-chargeability of certain of its political, ideological, and non-collective bargaining paragraph 22 expenditures. The admittedly non-chargeable expenditures are described in subparagraphs (6), (7), (9), (11), and (12) (J.A.III 236-37). BRAC questioned the district court's paragraph 22 ruling only with regard to organizing, convention and publication expenditures, litigation costs, the death benefit program, and social activities.

In reversing the district court's conclusions with regard to the chargeability of the challenged expenditures, the Ninth Circuit majority applied a standard utterly foreign to cases involving governmental interference with the exercise of first amendment freedoms. The majority held that "the relevant inquiry is whether a particular challenged expenditure is germane to the union's work in the realm of collective bargaining." *Ellis v. Brotherhood of Railway, Airline & Steamship Clerks*, 685 F.2d 1065, 1072 (9th Cir. 1982) (App. Cert. 10a). This murky standard, which asks whether "each of the challenged expenditures can be seen to promote, support or maintain the union as an effective collective bargaining agent," *id.* at 1074-75 (App. Cert. 13a-14a), can be employed to include as chargeable any expenditure which arguably supports the union as an

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[7] Hereafter, the categories of expenditures which the district court found not to be chargeable to protesting employees are referred to as "paragraph 22" expenditures.

institution.[8] At most this is a mere "rational basis" standard of review for assessing chargeability, limiting the judicial inquiry to whether any state or facts either known or reasonably assumed can support the legislative measure. *E.g., Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955); *U.S. v. Carolene Products Co.*, 304 U.S. 144, 152-54 (1938).

The only appropriate standard for judging the chargeability of challenged expenditures is that each expenditure must be directly related to and reasonably necessary for the performance of the statutory functions of contract negotiation, contract administration and grievance adjustment (hereafter these functions are referred to collectively as "collective bargaining"). This precise rule was employed by the special master in *Beck v. CWA*, No. M-76-839, Report of Special Master at 12 (D. Md. Aug. 18, 1980) (Supp.App. 2a),[9] to cull chargeable collective bargaining expenses; and it was accepted by the district court in adopting the special master's report. *Beck v. CWA* 112 L.R.R.M. 3069, 3073 (D. Md. Mar. 4, 1983) (Supp.App. 21a);[10] *Ball v. City of Detroit*, 84 Mich. App. 383, 395, 269 N.W.2d 607, 612 (1978). The same test has been stated in dicta

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[8] The extent to which the majority's test impinges upon the first amendment rights of protesting employees is evident from the suggestion that impermissible political expenditures be limited to direct or indirect support to candidates for political office and political parties. Any other expenditures, regardless of their political nature, would be fully chargeable. 685 F.2d at 1072 n. 5 (App. Cert. 10a-11a). This standard is in direct conflict with *Street*, 367 U.S. at 744 & n.2, 768, which placed the propagation of political and economic doctrines, concepts and ideologies and the promotion of legislative programs in the impermissible category, and *Abood*, 431 U.S. at 235-36, 241, which reaffirmed that financial support of "ideological causes not germane to [a union's] duties as collective bargaining representative" may not be compelled. *Accord Ellis*, 685 F.2d at 1075-76 (Whelan, J., dissenting) (App. Cert. 15a-16a); *see Robinson v. New Jersey*, 547 F.Supp. 1297, 1316-17 (D. N.J. 1982) ("*Robinson I*"), *further proceedings*, 113 L.R.R.M. 3272 (D. N.J. June 15, 1983) ("*Robinson II*") (lobbying expenses unchargeable); *Olsen v. CWA*, 559 F.Supp. 754, 769-70 (D. N.J. 1983).

[9] The full original report of Special Master Barnes dated August 18, 1980, and Special Master Barnes' supplemental report dated September 14, 1981, have been lodged with this Court for its consideration. "*Beck - Special Master I*" refers to the original report. "*Beck - Special Master II*" refers to the supplemental report.

[10] In defining the term "collective bargaining," the special master and the district court in *Beck* accepted the common understanding of that term as limited to the actual negotiations between employer and a labor union to reach an agreement over the subjects of wages, hours, and working conditions. *See Beck - Special Master I* at 10-11, 41; *Beck - Special Master II* at 50.

by other courts discussing the holding of *Abood*. *Gavett v. Alexander*, 477 F.Supp. 1035, 1048 (D.D.C. 1979) ("expenditures essential to the collective bargaining process"); *see Kania v. Fordham*, 702 F.2d 475, 478-79 (4th Cir. 1983); *cf. Arrow v. Dow*, 544 F.Supp. 458, 463 (D.N.M. 1982) ("the Bar may exact dues to support only those duties and functions of the Bar which serve important or compelling governmental interests").

A "directly related" or "essential" standard of chargeability is fully consistent with the strict standard of judicial review afforded the infringement of first amendment rights. *The Supreme Court, 1976 Term*, 91 Harv. L. Rev. 70, 196-98 (1977). It also effectuates completely the congressional concern which led to the authorization of the union shop and is consistent with Section 2, Eleventh's legislative history as interpreted in *Street* and summarized in *Abood*.

Abood explained the governmental justification for this Court's holdings that union shop and agency shop agreements, properly limited, are constitutional. The Court first noted that "[t]he principle of exclusive representation . . . is a central element" underlying the labor relations systems established by the National Labor Relations Act, 29 U.S.C. §§ 151-69 (1976), and the Railway Labor Act, 45 U.S.C. §§ 151-88 (1976). *Abood*, 431 U.S. at 220. Referring to its earlier decisions in *Hanson* and *Street*, the Court explained that this principle, and the duty of fair representation which stems from it, provided both the congressional rationale and the constitutional justification for the union shop requirement in the private sector:

> The designation of a union as exclusive representative carries with it great responsibilities. The tasks of negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances are continuing and difficult ones. They often entail expenditure of much time and money. . . . Moreover, in carrying out these duties, the union is obliged "fairly and equitably to represent all emplolyees. . . , union and nonunion," within the relevant unit. . . . A union-shop arrangement has been thought to distribute fairly the cost of these activities among those who benefit, and it counteracts the incentive that employees might otherwise have to become "free riders" -- to refuse to contribute to the union while

> obtaining benefits of union representation that necessarily accrue to all employees. . . .
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> . . . An employee may very well have ideological objections to a wide variety of activities undertaken by the union in its role as exclusive representative. . . . To be required to help finance the union as a collective-bargaining agent might well be thought, therefore, to interfere with an employee's freedom to associate. . . . But the judgment clearly made in *Hanson* and *Street* is that such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress.

Abood, 431 U.S. at 221-22 (citations omitted).

The Court then recognized that Michigan's public employment relations act was modeled on the federal labor system: "The governmental interests advanced by the agency-shop provision in the Michigan statute are much the same as those promoted by similar provisions in federal labor law," *i.e.*, the avoidance of "[t]he confusion and conflict that could arise" if employers had to bargain with more than one union, and the elimination of "the risk of 'free riders'." *Id.* at 223-24. Therefore, as "[t]he differences between public- and private-sector collective bargaining . . . do not translate into differences in First Amendment rights," the Court concluded that the Michigan statute was constitutional "insofar as the service charges are related to collective-bargaining, contract administration, and grievance-adjustment purposes." *Id.* at 232.

If the constitutional justification for the union or agency shop is to make "free riders" reimburse the union for its costs as their exclusive bargaining representative, the employees' obligation to pay must be limited by the scope of the union's statutory functions as exclusive representative. And so the Court implicitly held in *Abood*, 431 U.S. at 234, agreeing with the dissenting employees' argument "that they may constitutionally prevent the Union's spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative." The first amendment prohibits a union from using fees of dissenters to finance "the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not

germane to its duties as collective bargaining representative." *Id.* at 235.[11]

As the related doctrines of exclusivity and fair representation prompted authorization of the union shop, it follows under the "least restrictive alternative" test that BRAC can justify only a requirement that plaintiffs support the statutorily required collective bargaining activities with Western Airlines. The statutorily defined collective bargaining process is one which pertains only to a particular employer-union relationship. *See Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 64 (1975); *Steele*, 323 U.S. at 202-08. Internal union activities or programs which do not arise directly from the employment relationship are excluded from the duty of fair representation. *See Kolinski v. Lubbers*, 113 L.R.R.M. 2957, 2966 (D.C. Cir. June 17, 1983) (eligibility for strike benefits); *Bass v. Boilermakers, Local 582*, 630 F.2d 1058 (5th Cir. 1980); (expulsion from apprenticeship program); *United Food & Commercial Workers International Union, Local 222*, 245 N.L.R.B. 1035, 1039-40 (1979) (eligibility for strike benefits).

The specific legislative history of Section 2, Eleventh, compels the same conclusion on statutory grounds. Examining that history in detail in *Street*, the Court first noted that in adopting Section 2, Eleventh, Congress modified its "firm legislative policy against compulsion . . . only as a specific response to the recognition of the expenses and burden incurred by the unions in the administration of the complex scheme of the Railway Labor Act." *Street*, 367 U.S. at 751. The role of unions under this statutory scheme was next described by the Court as "collective bargaining as the method of settling railway disputes, . . . the status of exclusive representatives in the negotiation and administration of collective agreements, . . . representation on the statutory board to adjudicate grievances, . . . [and] the duty fairly and equitably to represent all employees of the craft or class, union and nonunion." *Id.* at 760-61.

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[11] Other passages in *Abood* are to the same effect. For example, in a footnote the Court reserved judgment as to whether the costs of social activities which the union allegedly financed were chargeable to the plaintiffs because it was "unclear to what extent such activities fall outside the union's duties as exclusive representative or involve constitutionally protected rights of association." 431 U.S. at 236 n. 33. And, the Court refused to require dissenting employees to specify the union activities which they opposed, in part because such a requirement would "place on each employee the considerable burden of monitoring all of the numerous and shifting expenditures made by the Union that are unrelated to its duties as exclusive bargaining representative." *Id.* at 241.

It was the costs of these functions only which Congress contemplated employees would be compelled to support:

> The principal argument made by the unions in [urging adoption of § 2, Eleventh] was based on their role in this regulatory framework. They maintained that because of the expense of performing their duties in the congressional scheme, fairness justified the spreading of the costs to all employees who benefited. They thus advanced as their purpose the elimination of the "free riders". . . .
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> This argument was decisive with Congress. . . . The conclusion to which this history clearly points is that § 2, Eleventh contemplated compulsory unionism to force employees to share the cost of negotiating and administering collective agreements, and the costs of the adjustment and settlement of disputes.

Id. at 761-64.[12]

The *Street* majority concluded its review of the legislative history of Section 2, Eleventh, by stating:

> [I]t is abundantly clear that Congress did not completely abandon the policy of full freedom of choice embodied in the 1934 Act, but rather made inroads on it for the limited purpose of eliminating the problems created by the "free rider." . . . We respect this congressional purpose when we construe § 2, Eleventh as not vesting the unions with unlimited power to spend exacted money.

Id. at 767-68. In *Street* the Court specifically construed the Railway Labor Act to exclude compelled support for union political and ideological activity because "it is a use which falls clearly outside the reasons advanced by the unions and accepted by Congress why authority to make union-shop agreements was justified." *Id.* at 768. But BRAC's

[12] *See also Street*, 367 U.S. at 764 n.15: "[T]he primary union and congressional concern was with the elimination of the 'free rider' who did not support his representative's performance of its functions under the Act."

use of plaintiffs' money for the various other non-collective bargaining purposes which are at issue in this case is equally "clearly outside the reasons" for Congress' authorization of union shops.

"[C]are must be taken not to confuse the interest of partisan organizations with governmental interests." *Elrod*, 427 U.S. at 362. The activities which are at issue in this case are not statutory functions of the union under the Railway Labor Act, but rather are BRAC's institutional or fraternal programs, activities which BRAC's voluntary members authorize it to do in their partisan interest and on their own behalf.

The distinction between collective bargaining costs and institutional expenses is implicit in *Street* and *Abood*. It was explicitly recognized by this Court in another of its decisions involving compulsory unionism, *Retail Clerks, Local 1625 v. Schermerhorn*, 373 U.S. 746, 752-54 & n.6 (1963). There the Court took judicial notice of the fact that unions use members' dues for purposes other than collective bargaining services and quoted examples of such non-collective bargaining purposes. The listed "institutional activities" included a number of the activities which in this case the district court held to be paragraph 22 expenses, *i.e.*, promotion of desirable legislation and defeat of undesirable legislation, publication of newspapers and magazines, and the financing of litigation.[13]

Significantly, the *Schermerhorn* dichotomy "between collective bargaining and institutional expenses" was noted by the Court in *Abood*, 431 U.S. at 237 n.35. In dissenting from the Ninth Circuit majority's decision in this case, Judge Whelan argued that his two colleagues erred by misreading *Abood* and ignoring *Schermerhorn*. *Ellis*, 685 F.2d at 1076 (App.Cert. 15a-16a) (Whelan, J., dissenting). Under both the first amendment strict scrutiny required by *Abood* and the legislative analysis of *Street*, this Court's decisions define the parameters of the chargeability of union expenditures with unmistakable clarity. As Judge Whelan would have held, only those expenditures which are costs of BRAC's performance of its statutory duties in representing clerical employees of Western Airlines are chargeable to dissenters. *Ellis*, 685 F.2d at 1076 (App.Cert. 15a-16a). Neither BRAC's political and ideological expenditures nor its institutional programs fall within that definition.

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[13] "Institutional" activities, as that term is used in *Schermerhorn*, are really fraternal or associational activities, which are to be distinguished from some overhead costs which are properly allocable to collective bargaining, contract administration, and grievance adjustment.

III.

EACH OF THE PARAGRAPH 22 ITEMS IS AN IDEOLOGICAL OR INSTITUTIONAL EXPENSE WHICH CANNOT BE CHARGED TO DISSENTERS.

In holding each expense on which it ruled to be fully chargeable, the Ninth Circuit majority did not identify any direct connection with the three narrow collective bargaining functions which may be charged to dissenting employees. The panel majority instead relied upon factors irrelevant to the considerations which led Congress to pass Section 2, Eleventh, and this Court to uphold the constitutionality of properly applied compulsory unionism agreements. In each case, the Ninth Circuit upheld the challenged expenditure, not because it was a cost of collective bargaining with Western Airlines, but because the expenditure in some way could be said to "strengthen" the union and thus generally make it an "effective" bargaining agent. *See Ellis*, 685 F.2d at 1073-75 (App.Cert. 10a-14a).

This amorphous test fails to meet first amendment standards, *see Beck - Special Master I* at 12, *adopted*, 112 L.R.R.M. at 3069 (Supp.App. 16a-18a), and it is contrary to the *Street* court's interpretation of the Railway Labor Act's legislative history. Presenting the unions' case for the union shop to Congress, "Mr. Harrison [BRAC's International President] expressly disclaimed that the union shop was sought in order to strengthen the bargaining power of the unions. . . . Nor was any claim seriously advanced that the union shop was necessary to hold or increase union membership." *Street*, 367 U.S. at 762-63 n. 13.

At most, the paragraph 22 items in question bear only a tangential relationship to collective bargaining. Each of these items is primarily an expense to further BRAC's efforts dedicated to the ideological cause of trade unionism. Each item is characterized accurately as an institutional activity in which BRAC voluntarily and unilaterally engages.

A. Death Benefits

BRAC's death benefit plan was created by the union constitution and is administered internally (CR 30, Ex. A at 52-55, 187-91). Employers do not participate in the administration of the plan and do not contribute to the plan on behalf of employees. The plan is funded entirely by

by voluntary dues and compelled non-member fees (*Id.* at 49-50). The death benefit program is not negotiated as part of the collective bargaining process and no reference is made to it in any Western Airlines' collective bargaining agreement.

The non-chargeability of such fraternal benefit programs has been clear since this Court's decisions in *Street* and *Allen*. In *Street*, death benefit programs were used by the majority as an example of an expenditure which did not invoke the "free rider" argument. 367 U.S. at 769-70 & n. 18. Justice Douglas noted that *Hanson*, which he authored, listed "various restrictions placed by union constitutions and by-laws on individual members" which may not be imposed or enforced by government. Some of these restrictions "required the use of portions of union funds for purposes other than collective bargaining." *Street*, 367 U.S. at 777 n. 3 (Douglas, J., concurring). The restrictions to which Justice Douglas referred were provisions "for the use of compulsory dues and assessments to finance union insurance and death benefit plans." *Hanson*, 351 U.S. at 236-37 n. 8. The *Allen* trial court found that compelled payments to support BRAC's death benefit system were not "reasonably necessary or related to collective bargaining" and could not be financed from protestors' fees. *See* 373 U.S. at 117. The *Allen* trial court's ruling was not disturbed by this Court.

BRAC concedes that its internal death benefit program bears a remote relationship to collective bargaining functions. (CR 30, Memorandum of Points and Authorities at 25). Nonetheless, the majority found that compelled financing of the death benefit plan was proper because: (1) death benefit plans "have historically played an important role in labor organizations," (2) insurance benefits are mandatory subjects of bargaining and internally provided death benefits allow BRAC to seek other concessions from employers, and (3) internal death benefit plans strengthen employees' ties to BRAC. *Ellis*, 685 F 2d at 1074 (App.Cert. 13).

That death benefit programs have historically been offered by some labor unions to their members is irrelevant to the issue of compelled support for those programs. The historical justification was advanced with regard to union political activity in *Street*. *See* 367 U.S. at 767, 800-03 (Frankfurter, J., dissenting). The Court rejected this argument because "it does not follow that § 2, Eleventh, places no restriction on the uses of

an employee's money, over his objection." *Id.* at 767.[14]

That insurance benefits are a mandatory subject of collective bargaining also is irrelevant. The BRAC program is a provision of the union-member constitution, not the union-employer labor agreement.[15] The Ninth Circuit majority also offered the supposition that BRAC, having required plaintiffs to pay directly for a self-insured program out of their own pockets, would necessarily obtain a corresponding monetary benefit from Western Airlines. This economic theory is absurd. It is unsupported by any facts of record or cited authority.

Finally, the claim that BRAC's death benefit program tends to strengthen employees ties to the union reflects the institutional bias tainting the Ninth Circuit majority's loose standards of chargeability.

B. Conventions

The Ninth Circuit majority held that every dollar BRAC spends on its conventions is chargeable. Plaintiffs do not contend that all expenses of BRAC conventions are non-chargeable. Plaintiffs do contend that they can be charged only their proportionate share of convention costs which are proven to be directly related to collective bargaining with Western Airlines. In the trial court, BRAC failed to establish the cost of convention activities chargeable to plaintiffs, which it was required to do under *Allen*, 373 U.S. at 122, *quoted with approval in Abood*, 431 U.S. at 239 n. 40; *see Beck*, 112 L.R.R.M. at 3073-74 (Supp. App. 18a) (union's failure to keep adequate records resulted in failure of proof).

The district court's finding that BRAC's conventions are not a collective bargaining activity was based on the record with regard to the Twenty-fifth Regular and Eleventh Quadrennial Convention. This convention, which also was the basis for the majority's contrary conclusion,

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[14] A similar argument fared no better when advanced to support the constitutionality of political patronage in public employment. *Elrod v. Burns*, 427 U.S. at 353-55 (plurality opinion).

[15] If the death benefit plan were truly bargainable, BRAC would not have been free to deny non-members participation in that program as it did prior to plaintiffs' motion for summary judgment. *See, e.g., Local 167, Progressive Mine Workers v. NLRB*, 422 F.2d 538 (7th Cir.), *cert. denied*, 399 U.S. 905 (1970); *Prestige Bedding Co.*, 212 N.L.R.B. 690 (1974) ($1,000 death benefit provided in collective bargaining agreement).

cost BRAC in excess of $1,802,000 (CR 155 at 44). A copy of the proceedings of that convention is part of the record in this case (CR 155, Ex. S).

The convention minutes reveal heavy emphasis upon political, ideological, and social activities and programs. Nine major addresses were made by professional politicians such as the mayor of Washington, D.C., Senators Hartke, Schweiker, Humphrey, and Kennedy, and four Congressmen. (CR 155, Ex. S at 3-6, 36-46, 96-98, 107-14, 154-59, 194-203, 217-20, 248-52, 255-57). Addresses were made by George Meany, then president of the AFL-CIO, and Alexander Barkan, director of the AFL-CIO Committee on Political Education, which Barkan described as "the greatest political organization in the country today" (*Id.* at 268-73, 276-78). These speeches had nothing to do with collective bargaining between BRAC and Western Airlines, but were heavily laced with political and ideological advocacy. In addition, reports were received on union lobbying activities and resolutions were passed on a wide range of political and ideological issues (*Id.* at 236-43, 305-10, 341-42, 344-47).

The convention had little or nothing to do with collective bargaining with Western Airlines. Substantial convention activity was devoted to intra-union politics, disputes, and fiscal management. *See Ellis*, 685 F.2d at 1073 (App. Cert. 11a); *Rota v. BRAC*, 489 F.2d 998 (7th Cir. 1973), *cert. denied*, 414 U.S. 1144 (1974), *further proceedings*, 64 F.R.D. 699 (1975).

The Ninth Circuit majority concluded that "[s]uch activities guide the union's approach to collective bargaining and are directly related to its effectiveness in negotiating labor agreements." *Id.* at 1073 (App.Cert. 11a). Once again, this is a particularized application of an overly vague, erroneous test. BRAC's conventions are a fraternal activity serving the institutional interests of union officers and voluntary members. BRAC holds conventions, not as a requirement of federal law, but in keeping with the union constitution (CR 30, Ex. A at 5-17; Def. Ex. A at 6-19, admitted Aug. 1, 1978 RT at 6-8).[16] Formal membership in BRAC is a

[16] The Ninth Circuit's reference to the requirement of the Labor-Management Reporting and Disclosure Act § 401(a), 29 U.S.C. § 481(a) (1976), that unions elect officers at least once every five years by *referendum or* convention, *Ellis*, 685 F.2d at 1073 n. 6 (App.Cert. 11a), is irrelevant. BRAC's voluntary decision to continue its historical practice of electing officers at conventions which consider many other matters, most of which

(Footnote 16 continued on page 22)

requirement for all delegates and alternates and is the basis for representation at the convention (CR 30, Ex. A at 5-12; Def. Ex. A at 6-13). Only that proportion of this fraternal congregation which BRAC proves is directly related in fact to representation of the Western Airlines bargaining unit is chargeable to plaintiffs. BRAC did not meet its burden of establishing Western Airlines collective bargaining costs.

C. Publications

A cursory review of the *Railway Clerk/interchange* magazine reveals that the predominant purpose of this publication is not to convey collective bargaining information, but to promulgate BRAC's political, ideological, and fraternal causes.

Virtually every issue of the BRAC magazine contains articles or reports discussing legislation and other political issues (CR 121, Affidavit of Scott Royce and Report on BRAC Legislative Activity and Exhibits thereto at 17-20 & nn. 139-68, 170-80). The publication regularly lists business and consumer products which are subject to BRAC-endorsed boycotts, an ideological commitment (CR 121, Appendix to Memorandum of Points and Authorities in Support of Motion for Summary Judgment at 37-66).

The district court found that BRAC's publications are "[p]ublications in which substantial coverage is devoted to general news, recreational and social activities, political and legislative matters, and cartoons." (J.A.III 236). The Ninth Circuit majority held the total cost of BRAC publications to be chargeable because those publications contained *some* articles reporting on Western Airlines' bargaining. *See* 685 F.2d at 1074 (App.Cert. 12a).

Schermerhorn, 373 U.S. at 753 n. 6, lists the use of union dues "to publish newspapers and magazines" as an institutional expense. Publication of a union newsletter or magazine is a first amendment-protected activity. Dissenters may be forced to subsidize a union publication only to the extent that it directly and necessarily fulfills the bargaining function. As BRAC failed to show the collective bargaining-related portion,

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(Footnote 16 continued from page 21)

are political, ideological, or fraternal in nature, cannot be a justification for forcing dissenting employees to subsidize the entirety of those functions.

the district court correctly held that all BRAC publication costs are non-chargeable.

D. Litigation

Litigation is a form of association and expression protected by the first amendment. *In re Primus*, 436 U.S. 412, 428 (1978); *United Transportation Union v. Michigan Bar*, 401 U.S. 576, 580 (1971); *NAACP v. Button*, 371 U.S. 415, 429, 431 (1963). Indeed, litigation "related to labor issues will frequently constitute political activity which lies at the core of first amendment protections." *UAW v. National Right to Work Legal Defense & Education Foundation, Inc.*, 590 F.2d 1139, 1147-48 (D.C. Cir. 1978). Under the test for chargeability derived from *Abood* and *Street*, dissenting employees may not be compelled to subsidize union litigation unless that litigation has as its subject matter the negotiation, administration, or interpretation of the collective bargaining agreement covering those employees (including grievances thereunder).

This view is consistent with the *Schermerhorn* list of "noncollective bargaining purposes," which includes the use of dues "to finance litigation." 373 U.S. at 753 n. 6; *see Maryland Public Interest Research Group v. Elkins*, 565 F.2d 864, 867 (4th Cir. 1977), *cert. denied*, 435 U.S. 1008 (1978).

Thus, the trial court was correct in this case when it limited chargeable litigation expenses to those involving contract negotiation, contract administration, and grievance adjustment with Western Airlines (J.A.III 244-45).[17] The Ninth Circuit majority recognized that the litigation expenses affected by paragraph 22 "did not pertain to any specific collective bargaining agreement or grievance." *Ellis*, 685 F.2d at 1073 (App. Cert. 12a). Nonetheless, it found that such expenses are fully chargeable to plaintiffs because the litigation concerned such things as the legality of the airline industry's Mutual Aid Pact, bankruptcy proceedings (none of which involved Western Airlines), and BRAC's defense to claims that it has violated the duty of fair representation and Title VII of the Civil Rights Act of 1964, 29 U.S.C. § 2000(e), *et seq.* (1976). *Id.* at 1073-74 (App. Cert. 12a). As the district court's test is correct under *Abood* and

[17] The district court was incorrect, however, in including expenses incurred in this litigation as a chargeable item (J.A.IV 368). *See infra* note 18.

Street, and as the majority found that none of the litigation at issue met that test, none of the expenses of that litigation can be charged to the plaintiffs.[18]

E. Social Activities

BRAC has virtually conceded that its contributions to other labor organizations, charities, and individuals are not chargeable to protestors. These fraternal expenses are now covered by the rebate scheme (J.A. - Exhibits 427-32; admitted Aug. 1, 1978 RT at 6-8). Yet BRAC's appeal to the Ninth Circuit challenged the district court's inclusion of the costs of analogous social activities as a non-chargeable item. BRAC seeks to charge protesting employees for banquets, retirement parties, floral tributes, and Christmas parties, even though International Secretary-Treasurer Sullivan admitted that social activities not attended by the employer could not be related to collective bargaining (CR 104, Deposition of Sullivan at 261).

Labor organizations are fraternal associations; their secondary role is that of a bargaining representative. As a fraternal organization, BRAC is free to make expenditures for social affairs and entertainment of any kind from voluntary payments. BRAC need not incur any expense for such activities in the performance of its collective bargaining functions. The use of the plaintiffs' funds to finance the fraternal conviviality of their unwanted union representative cannot reasonably be twisted to fit the mold of a collective bargaining expense. The Ninth Circuit made the assumption that BRAC's social activities "are important to union members," *Ellis*, 685 F.2d at 1074 (App. Cert. 13a), but it was error to

[18] Participation in the bankruptcy proceedings of *other* employers is not within the scope of the duties which the union owes to the plaintiffs as *their* exclusive representative. *See* pp. 11-17 *supra*. *None* of BRAC's other legal expenses at issue in this case involved the negotiation or administration of contracts, or the adjustment of grievances, with Western Airlines. A report of BRAC's legal department for court litigation handled through 1977 (Def. Ex. BU(2), admitted Aug. 1, 1978 RT at 6-8) reveals only three cases which involved Western Airlines, two of which were these consolidated cases (*Id.* at 8, 9, 13). All three cases allege that BRAC breached its fiduciary duty to fairly represent employees. *Abood* and *Street* do not support the proposition that employees who want no associational relationship with a union can be compelled to subsidize its defense of its alleged wrongdoing or the alleged wrongdoing of its officers. Such litigation advances or defends the union as an institution, not as the employees' exclusive representative. Of the remaining eighty-two cases reported, forty-seven (56%) were suits in which BRAC was charged with a breach of the duty of fair representation or a violation of employees' civil rights.

conclude that such costs therefore can be charged to those who are not voluntary union members.

F. Organizing

Next to the use of protestors' fees to support political candidates, legislation or other political or ideological causes, organizing expenses have the most blatant and direct impact upon their first amendment freedoms. Organizing is the advocacy of the fundamental ideological commitment to unionism, and the marketing of BRAC as a trade union and as a fraternal organization to others.

In an organizing campaign, employees do not speak with one voice and are not of one mind. Unions are regularly defeated in their attempts to attain and to maintain their representation of employees, as BRAC was when decertified as the representative of the clerical employees of Western Airlines. Organizing is expensive; between 1974 and 1977 defendant System Board No. 451 spent over $100,000 on organizing efforts without producing a single new member (CR 260, Affidavit of Anne Healan, Ex. A).

The controlling first amendment principles have long been settled. "[B]oth the employee and the employer are protected by the First Amendment when they express themselves on the merits of [a labor] dispute in order to influence its outcome." *Virginia State Board of Pharmacy*, 425 U.S. at 762. "The right to discuss, and inform people concerning, the advantages and disadvantages of unions and joining them is protected not only as part of free speech, but as part of free assembly." *Thomas v. Collins*, 323 U.S. at 532.

Organizing activities are aimed at the advancement of BRAC's parochial political, social and economic philosophies. They are intended to advance the institutional interest of expanding its financial base. BRAC and its adherents have a constitutionally protected right to advocate the expansion of their organization, but plaintiffs have equivalent constitutional rights not to speak and not to associate in furtherance of that cause.

Organizing is not a function the exclusive bargaining representative is required to perform under the Railway Labor Act. It was not one of the reasons advanced by unions seeking authorization for the union shop.

In convincing Congress to enact Section 2, Eleventh, BRAC President Harrison "*expressly disclaimed* that the union shop was sought in order to strengthen the bargaining power of unions." *Street*, 367 U.S. at 762 n. 13 (emphasis added). The tenuous bargaining strength argument was the sole ground for the Ninth Circuit majority's conclusion that organizing is chargeable to dissenting employees. *See Ellis*, 685 F.2d at 1074 (App.Cert. 13a). That premise was not one of the reasons accepted by Congress in enacting Section 2, Eleventh, and it follows that organizing serves no acknowledged governmental purpose. It therefore cannot be the compelling governmental interest required to justify forced financial support for an activity so permeated with an ideological essence.

IV.

BECAUSE OF THE TRANSCENDENT VALUE OF PLAINTIFFS' FIRST AMENDMENT RIGHTS, DUE PROCESS MANDATES THAT BRAC ESTABLISH CHARGEABLE COLLECTIVE BARGAINING COSTS BY CLEAR AND CONVINCING EVIDENCE WHICH MEETS ACCOUNTING STANDARDS.

BRAC did not prove its costs of collective bargaining with Western Airlines. Instead, it identified only those expenditures which it deemed to fall into paragraph 22 categories (J.A. - Exhibits 401-20, admitted Aug. 1, 1978 RT at 6-8; Def. Ex. C, admitted Aug. 8, 1978 RT at 6-8; J.A.IV 367-68). That approach maximizes the cost burden borne by plaintiffs. Every dollar spent by BRAC was presumptively considered to be a cost of collective bargaining with Western Airlines unless it was excluded. This approach has been condemned judicially when utilized by an agency of the federal government. *National Cable Television Association, Inc. v. FCC*, 554 F.2d 1094, 1105 (D.C. Cir. 1976); *see National Cable Television Association, Inc. v. U.S.*, 415 U.S. 336, 340-44 (1974); *FPC v. New England Power Co.*, 415 U.S. 345, 349-51 (1974). It is equally invalid in the area of union spending litigation. *Beck v. CWA*, 112 L.R.R.M. at 3073 (Supp. App. 16a-18a); *School Committee of Greenfield v. Greenfield Education Association*, 385 Mass. 70, 76-77 n. 3, 431 N.E.2d 180, 185 n. 3 (1982); *Ball*, 84 Mich. App. at 395-96, 269 N.W.2d at 612-13; *see Robbinsdale Education Association v. Teachers, Local 872*, 307 Minn. 95, 107-08, 239 N.W.2d 437, 444, *vacated and remanded sub nom. Threlkeld v. Teachers, Local 872*, 429 U.S. 880 (1976), *reinstated*, 316 N.W.2d 551, 552 (Minn.), *cert. dismissed*, 103 S.Ct. 24 (1982).

The trial court and the Ninth Circuit allowed BRAC to evade its burden of proving chargeable costs. Moreover, the damages issues upon which BRAC presented proof were determined upon an inappropriate standard. Defendants were held to a preponderance standard, rather than that of clear and convincing proof. The results of using the less rigorous preponderance standard must be evaluated in the light of BRAC's grossly inadequate accounting records and its non-adherence to generally accepted accounting principles. BRAC admittedly owed plaintiffs "a fiduciary obligation not to misspend dues receipts. . . ." (CR 80 at 31; *see also* J.A.I 10, 26, 71, 84-85, 101; II 165). Obviously, the duty "not to misspend" plaintiffs' dues and fees carries with it a correlative obligation to maintain records so that the courts can ascertain whether or not the union has complied with its fiduciary obligation.

None of the defendants has maintained accounting records to isolate the costs of collective bargaining with Western Airlines, or those incurred for paragraph 22 expenses (Aug. 2, 1978 RT at 255-56; Aug. 3, 1978 RT at 390-91; Aug. 8, 1978 RT at 733-34, 803-04, Pl. Ex. 638, admitted Aug. 8, 1978 RT at 764). Records of the defendants are not maintained in accordance with generally accepted accounting principles (Def. Exs. D to BY, E to BZ, all admitted Aug. 1, 1978 RT at 6-8). At the Grand Lodge, arbitrary fund accounting segregation is used, but frequent interfund transactions obscure this ostensible segregation. Use of this accounting method has met with strong criticism:

> Fund accounting is a necessary evil born of the legal requirement to segregate and account separately for certain funds, and should never be used when such requirements are not present. It produces complex and confusing financial statements. It can be used by the unscrupulous to shift, create, and conceal income and expense in an accounting version of the old shell game.

The Law of Associations, 18-6 (G. Webster ed. 1975). The evil described is a reality here. Both the Grand Lodge and AFL-CIO's Committee on Political Education use fund accounting. They collaborated to "launder" $100,000, illegally channeling funds of union members and agency fee payors into the campaigns of political candidates endorsed by the AFL-CIO. This shell game was analyzed and documented by plaintiffs' expert Ross (J.A.II 177-92). Ross' analysis has never been refuted. There is substantial difficulty in attempting to ascertain the cost of a particular Grand Lodge program or activity, as data are obscured by its use

of fund accounting. Gross and Martin, "Cost Accounting in Nonprofit Organizations," in *Handbook of Cost Accounting*, at 25-7 (Davidson & Weil ed. 1978).

At the system board and local lodges, accounting records have been maintained on the basis of natural expense classifications (*i.e.*, rent, salaries), rather than functional classifications such as collective bargaining with Western Airlines, organizing, or political activities. As stated in the *Handbook of Cost Accounting*, "functional reporting is essential if meaningful 'cost' data are to be developed." *Id.* at 25-10.

The search for meaningful cost data was the entire point of the trial below. Defendants failed utterly to establish compliance with any recognized accounting standards; their proof consisted largely of estimates of time spent and suppositions as to the purpose of given expenditures. No expert witness validated these flimsy efforts.

Plaintiffs presented a Certified Public Accountant, Irving Ross, with a thorough grasp of the issues in the case and intimate familiarity with defendants' records. Mr. Ross spent approximately 1200 hours in reviewing documentation in these cases, union records, attending depositions, and sitting throughout the trial (Aug. 10, 1978 RT at 1079-87). He testified that it is impossible to make verifiable determinations of BRAC's expenditures in accordance with generally accepted accounting principles (*Id.* at 1089-90, 1093, 1127, 1130, 1133, 1155). Plaintiffs presented another Certified Public Accountant and professor of accounting, Arthur Brodshatzer. He agreed with Ross that not only had BRAC failed to submit accounting proof meeting a fiduciary standard, the union's proof did not rise to the level of ordinary business standards (*Id.* at 1133, 1229-30). As to the limited area of political expenditures and subsequent BRAC rebate calculations, the union offered no rebuttal to Ross' opinion that rebate calculations for years prior to the trial were unreliable (*Id.* at 1104).[19]

The trial court accepted defendants' evidence on the allocation of costs of the union's activities, notwithstanding its gaps, errors and lack of adherence to a measurable accounting standard of reliability. The only attempt at apportioning Grand Lodge legal expenses was made by

[19] Mr. Ross testified at similar length in *Beck v. CWA, supra*. Special Master Barnes found him to be unusually well qualified, objective, truthful and accurate. *Beck - Special Master I* at 15-16.

Comptroller Howard, a non-lawyer (Aug. 8, 1978 RT at 847). He allocated BRAC's in-house legal expenditures for the years *1976* and *1977* by examining the correspondence files of the BRAC legal department for *March and April, 1978*. Howard estimated the percentage of pieces of correspondence which he characterized as dealing with collective bargaining matters and allocated that entire department's costs for the full years of 1976 and 1977 based upon that estimate (*Id.* at 791-92).

Had the appropriate "clear and convincing evidence" standard been applied in *Ellis*, plaintiffs' legal right to be free from compulsory support of non-collective bargaining activities might have been observed. The trial court's damages award is in shocking contrast to that of *Beck*, where painstaking analysis of accounting methods and evidence was undertaken, and the clear and convincing standard was applied. CWA and BRAC are structurally and functionally comparable, yet fully 79% of dissenters' fees in *Beck* were found to be non-chargeable, at all organizational levels. 112 L.R.R.M. at 3073, 3075 (Supp.App. 20a, 21a-22a). In *Ellis*, judicial condonation of BRAC's slipshod accounting, coupled with the application of the meager preponderance standard of proof, provided the union with a massive windfall. The union has been allowed to retain 60% or more of plaintiffs' fees at the Grand Lodge level, and nearly 100% at other levels.

The financial injuries inflicted upon plaintiffs are vastly overshadowed by the violations of their first amendment rights. Protection of those rights is dependent upon use of the clear and convincing standard.[20] That standard is imposed to safeguard liberty interests, in keeping with their lofty value. *Addington v. Texas*, 441 U.S. 418, 425 (1979); *Speiser v. Randall*, 357 U.S. at 526; *Beck v. CWA*, 112 L.R.R.M. at 3073 (Supp.App. 16a-18a).

Plaintiffs' interest in not being compelled to support the union's political, ideological, and institutional activities is of a constitutional dimension. An infringement on these rights, even temporarily, causes irreparable injury. *Elrod v. Burns*, 427 U.S. at 373 (plurality opinion); *Citizens for a Better Environment v. City of Park Ridge*, 567 F.2d 689, 691 (7th Cir. 1975); *Olsen v. CWA*, 559 F.Supp. at 768; *Lehnert v. Ferris*

[20] BRAC's admitted fiduciary duty not to misspend plaintiffs' fees also supports the application of the clear and convincing standard of proof. A fiduciary called upon to account for property entrusted to him must establish its handling of that property by clear and convincing evidence. *Hobson v. Eaton*, 399 F.2d 781, 784 (6th Cir. 1968), *cert. denied*, 394 U.S. 928 (1969).

Faculty Association, 556 F.Supp. 316, 319 (W.D. Mich. 1983). The public interest requires steadfast protection of these rights. *Robinson II*, 103 L.R.R.M. at 3277; *Olsen v. CWA*, 559 F.Supp. at 768. Society bears the risk of error where infringement of first amendment rights is at issue by assuming the heavy burden of affirmatively showing that any invasion of individual freedoms, presumed to be unlawful, is supported by a compelling governmental interest lending itself to no less restrictive alternative. *Buckley v. Valeo*, 424 U.S. at 25; *Healy v. James*, 408 U.S. at 184; *Freedman v. Maryland*, 380 U.S. 51, 57 (1965); *Thomas v. Collins*, 323 U.S. at 530. As this Court mandated in *Kusper v. Pontikes*, precision of regulation where first amendment interests are affected is the touchstone. 414 U.S. at 59. Where a prior restraint is imposed, the party seeking to impose the restraint must both initiate the litigation and prove that the restraint is justified. *Abood*, 431 U.S. at 263 (Powell, J., concurring in the judgment); *Southeastern Productions, Ltd. v. Conrad*, 420 U.S. 546, 559-60 (1975); *Freedman v. Maryland*, 380 U.S. at 57-58.

The requirement that BRAC prove the amount of chargeable expenditures by clear and convincing evidence is simply a corollary to these settled principles, ensuring that these rights are effectively protected. A consequence of procedural inadequacies cannot be the surrender of first amendment rights. Congress would thereby have effected a result it could not have commanded directly, an outcome already condemned by this Court. *Speiser v. Randall*, 357 U.S. at 526.

BRAC can assert only a statutorily created right to exact monies from plaintiffs to support its collective bargaining activities. BRAC has no legitimate interest in the receipt and expenditure of plaintiffs' fees beyond the support of its collective bargaining activities with Western Airlines. *Robinson I*, 547 F.Supp. at 1320-21; *Greenfield*, 385 Mass. at 83-85, 431 N.E.2d at 189.

Unless a more exacting standard of proof is imposed, including compliance with generally accepted accounting principles, unions will continue to maintain their records in a manner thwarting the exercise of dissenters' objections. Protesting employees will relinquish their rights because of the lack of resources to analyze union records and accounting practices. Individual dissenters cannot shoulder the formidable financial burden to obtain the meager refunds recovered here. *Robinson I*, 547 F.Supp. at 1319; *cf. Freedman v. Maryland*, 380 U.S. at 59 (prior restraint to prevent exhibition of motion pictures must satisfy rigid

safeguards because exhibitor's financial stake in single picture may not warrant protracted and onerous litigation).

The facts in *Ellis* clamor for a clearly stated requirement of accounting standards. *Allen* imposed the burden of proof upon BRAC, but its discussion of accounting requirements has been misinterpreted as having condoned whatever accounting practices a union finds convenient.

BRAC was a defendant in *Street* for eleven years, and in *Allen* for eleven years. Yet thirteen years after the *Street* decision, BRAC's independent auditor and its International Secretary-Treasurer testified that neither collective bargaining costs nor expenditures for political activities could be determined. (CR 78 and CR 104, Depositions of Sullivan at 57, 176-78, 199-201, 284-88; CR 104, Deposition of Wende at 43-44, 48).

In treating all BRAC expenditures as being presumptively incurred for collective bargaining with Western Airlines, the courts below have rewarded BRAC handsomely for its contemptuous refusal to heed the rule of *Street* and *Allen*. That reward has been gift-wrapped in a burden of proof used to measure disputes in which only property interests are at stake.

V.

AN INTRA-UNION PROCEDURE WHICH ALLOWS A DISSENTERS' AGENCY FEE TO BE USED FOR IMPERMISSIBLE PURPOSES SUBJECT TO A LATER, UNION-DETERMINED REBATE IS CONSTITUTIONALLY INADEQUATE.

Since this action began, BRAC has collected full fees and has returned only a pittance to plaintiffs.[31] These rebates have been tendered pursuant to the scheme adopted by BRAC in October, 1975. The rebates are computed by BRAC, and have not been sent to plaintiffs until almost six months after the close of the year to which they pertain (J.A. - Exhibits, 438-44, 445-51, 452-53, admitted Aug. 1, 1978 RT at 6-8). Thus, for as long as a year and a half BRAC is free to use plaintiffs' full fees for

[31] For the years through 1976, the portion rebated was a mere 4.9%. For 1977, the rebate was only 5.4% (J.A.IV 366-67).

purposes which are unquestionably proscribed by the Railway Labor Act and the first amendment.

The district court found that this limited rebate procedure vindicated plaintiffs' rights in the political and ideological area (J.A.IV 366-67). By endorsing the rebate scheme as a prospective remedy, reversing the district court's paragraph 22 ruling, and instructing the district court "to enter judgment in favor of BRAC and to conduct any further proceedings necessary to comply with this opinion," *Ellis*, 685 F.2d at 1075 (App. Cert. 14a), the Ninth Circuit majority expunged the dues reduction feature of the final judgment (J.A.IV 367-68, 371).

The majority asserts that *Street* and *Allen* authorized a rebate procedure as a remedy for statutory violations, and that in *Abood* the rebate remedy was "approved to protect against constitutional violations as well." *Id.* at 1069-70 (App.Cert. 6a).

Street did not hold that any particular remedy was proper, because the Court remanded that case "to the court below for consideration of a proper remedy." 367 U.S. at 772. The Court discussed two "[a]mong possible remedies which would appear appropriate to the injury complained of." *Id.* at 774. The two "possible remedies" were an injunction against the union's expenditure of the portion of a dissenter's money allocable to unchargeable activities (in effect, a dues reduction) and restitution of that portion of the money expended improperly.[33]

The later discussion of appropriate remedies in *Allen* indicates that the Court considered restitution as part of "a practical decree" to remedy past violations, which can be remedied in no other way, avoiding future violations by ordering "a reduction of future exactions" by the proportion allocable to unchargeable activities. 373 U.S. at 122. The suggestion that unions should consider adopting "some voluntary plan by which dissenters would be afforded an internal remedy" was proferred by *Allen*

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[33] Justices Black and Whittaker dissented from the *Street* suggestion of proportionate restitution as a remedy. Both justices cogently described the practical deficiencies in refund procedures, with the beneficiaries being accountants, lawyers, and special masters, and the victims being the protesting employees. 367 U.S. at 779-80 (Whittaker, J., concurring in part and dissenting in part), 795-97 (Black, J., dissenting). Justice Douglas, who provided the crucial fifth vote for the opinion of the Court did so reluctantly, specifically recognizing the strength of Justice Whittaker's and Justice Black's dissents. *Id.* at 778-79 (Douglas, J., concurring).

simply "to remind the parties of the availability of more practical alternatives to litigation, . . ." *Id.* at 122-24. The Court declared in *Allen* that "[t]he courts will not shrink from affording what remedies they may with due regard for the legitimate interests of all parties." *Id.* at 124.

Street and *Allen* were decided on statutory grounds only, and did not address the constitutional sufficiency of intra-union rebate procedures. *Abood*, which addressed constitutional issues, left that question open; it contains strong hints that such schemes cannot meet constitutional standards. The Court specifically noted that "[w]e express no view as to the constitutional sufficiency of the internal remedy." 431 U.S. at 242 n. 45. Justice Stevens also explained in his concurring opinion that:

> By joining the opinion of the Court, including its discussion of possible remedies, I do not imply--nor do I understand the Court to imply--that the remedies described in . . . *Street* . . . and . . . *Allen* would necessarily be adequate in this case or in any other case. More specifically, the Court's opinion does not foreclose the argument that the Union should not be permitted to exact a service fee without first establishing a procedure which will avoid the risk that their funds will be used, even temporarily, to finance ideological activities unrelated to collective bargaining.

Id. at 244 (Stevens, J., concurring) (footnote omitted).

Every federal court (other than the Ninth Circuit), and almost every state appellate court, which has considered the question has concluded that this Court did not approve rebate procedures as a remedy in compulsory fee cases. *Perry v. Local Lodge 2569, IAM*, 708 F.2d 1258, 1261 (7th Cir. 1983); *Galda v. Bloustein*, 686 F.2d 159, 167-68 n. 15 (3rd Cir. 1982); *Robinson I*, 547 F.Supp. at 1317-18; *Beck v. CWA*, 468 F.Supp. 87, 90-91 (D.Md. 1979); *Greenfield*, 385 Mass. at 81 & n. 7, 431 N.E.2d at 187 & n. 7 (1982); *Ball*, 84 Mich. App. at 393-94, 269 N.W.2d at 611-12. Indeed, the court in *Robinson I* specifically rejected *Ellis* as unpersuasive on this issue because "the major premise for the Ninth Circuit's conclusion is flawed." 547 F.Supp. at 1318.

Analysis of first amendment principles demonstrates that the Ninth Circuit's conclusion is erroneous.[23] As constitutional principles shaped the statutory analysis of the Railway Labor Act in *Street*, constitutional standards must exert controlling influence over the formulation of permissible remedies. *Street* advised that the courts "should select remedies which protect both [the protesting employee's and the union's] interests to the maximum extent possible without undue impingement of one on the other." 367 U.S. at 773. Similarly, "the objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." *Abood*, 431 U.S. at 237.

Once an employee has stated an objection, the union is "without power to use" exacted fees for, and the employee has a "right to withhold his support of," impermissible purposes. *Street*, 367 U.S. at 771; *Abood*, 431 U.S. at 234. This rule effectuates the enduring principle that government cannot condition continued employment upon the relinquishment of individual rights guaranteed by the first amendment. *Id.* at 234-35. The Ninth Circuit's holding that protesting employees can be required to pay the full agency fee, which in part will be used to subsidize BRAC activities which are both statutorily and constitutionally nonchargeable, turns these constitutional principles on their heads. A rebate scheme conditions continued employment upon the relinquishment of the first amendment rights to freedom of speech and association and imposes a prior restraint upon the exercise of those freedoms by permitting forced loans to subsidize political and ideological activities.[24]

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[23] A union-administered rebate scheme also is unconstitutional on due process grounds because union officials make the initial determination of the amount of the rebate to be given to objectors. This violates the most fundamental notions of fair play. "[N]o man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome." *In re Murchison*, 349 U.S. 133, 136 (1955). This defect is not cured by the fact that the objecting employees may eventually get an impartial hearing on appeal; they are "entitled to a neutral and detached judge *in the first instance*." *Ward v. Village of Monroeville*, 409 U.S. 57, 61-62 (1972) (emphasis added); *see Glover v. St. Louis-S.F. Ry.*, 393 U.S. 324, 330-31 (1969); *Steele*, 323 U.S. at 206; *Greenfield*, 385 Mass. at 82, 431 N.E.2d at 188.

[24] Parallel reasoning led this Court to warn that a blanket injunction against union expenditures from voluntary dues payments for disputed purposes would be improper. Such an injunction, the Court suggested, might work a restraint on the expression of the union's political or ideological viewpoints and thus might be offensive to the first amendment. *Street*, 367 U.S. at 773.

The nature of the injury to the protesting employee is irreparable. The timeliness of the exercise of first-amendment rights is of particular importance. *Elrod v. Burns*, 427 U.S. at 374 n. 29 (plurality opinion); *Walker v. City of Birmingham*, 388 U.S. 307, 336 (1967) (Douglas, J., dissenting); *Bridges v. California*, 314 U.S. 252, 268-69 (1941).

Depriving BRAC of the use of funds to which it has no legitimate entitlement injures BRAC not at all. But the diversion of protesting employees' money damages them doubly. It renders them captive to the ideas, associations, and causes espoused by others, while at the same time depleting their own funds and resources and rendering them unable to express their own ideas and support their own causes. *Elrod v. Burns*, 427 U.S. at 355-56 (plurality opinion); *Seay v. McDonnell Douglas Corp.*, 427 F.2d 996, 1004 (9th Cir. 1970), *further proceedings*, 371 F.Supp. 754 (C.D. Cal. 1973) (Pregerson, J.), *reversed*, 533 F.2d 1126 (9th Cir. 1976); *Greenfield*, 385 Mass. at 83-84, 431 N.E.2d at 189.

Here, the span between the exaction of the full fee and the subsequent rebate has been eighteen months, a factor which contributed to the condemnation of a union's rebate scheme in the recent decision in *Perry v. Local Lodge 2569, IAM*, 708 F.2d at 1262. When full fees are paid and utilized by BRAC for political and ideological purposes in an election year such as 1976 (*see* J.A. - Exhibits 424, 445-51, 452-53, admitted Aug. 1, 1979 RT 6-8), a subsequent rebate cannot undo the irreparable injury caused by the forced support for BRAC's political efforts. The candidates elected cannot be recalled. Even in non-election years legislation passed as the result of union lobbying efforts cannot be repealed. In short, once political or ideological viewpoints have been expressed or political influence applied, they cannot be withdrawn from the marketplace of ideas, the legislative chamber, or the polling booth.

This Court has expressly refused to endorse the proposition that a wrong can be done if it can later be undone. *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972) (quoting *Stanley v. Illinois*, 405 U.S. 645, 647 (1972)). BRAC, the district court, and the Ninth Circuit have not identified any compelling justification for a union administered rebate procedure which permits the doing of wrongs which *cannot* be undone. The lack of any such governmental interest is evident, since the union always has it within its power to obtain the chargeable portion of the fees by providing proper accounting of its collective bargaining costs.

"[C]are must be taken not to confuse the interest of partisan organizations with governmental interests." *Elrod v. Burns*, 427 U.S. at 362 (plurality opinion). Plaintiffs do not concede that such an interest exists. They do agree with the Minnesota Supreme Court's conclusion that "the governmental interest in union [*sic*] stability is not so compelling as to bar an injunction against the use of the union fees until their validity has been determined in a hearing. . . ." *Robbinsdale*, 307 Minn. at 107, 239 N.W.2d at 444.

While there is no compelling governmental interest supporting a refund scheme, "the public interest lies in protecting the non-member's First Amendment right not to further causes with which he disagrees." *Robinson II*, 113 L.R.R.M. at 3277; *see Local 1814, Longshoremen v. Waterfront Commission*, 667 F.2d 267, 272 (2d Cir. 1981); *Anderson v. City of Boston*, 376 Mass. 178, 196, 380 N.E.2d 628, 639 (1978), *appeal dismissed*, 439 U.S. 1060 (1979). That public interest was advanced in *Ball*, 84 Mich.App. at 397, 269 N.W.2d at 613, the first lower court post-*Abood* decision, in its holding that "the proper solution is to require non-members to pay the service fees into an escrow account," an alternative which avoids "the risk that [non-members'] fees may be used, even temporarily, for activities to which they are opposed" and "ensure[s] the union will have prompt access to the funds to which it is entitled after a judicial determination." *Accord Robbinsdale*, 307 Minn. at 101, 109 n. 5, 239 N.W.2d at 441, 445 n. 5 (on due process grounds). Several lower courts have used similar reasoning.

In *Perry v. Local Lodge 2569, I.A.M.*, the Seventh Circuit found that a multi-tiered rebate scheme similar to BRAC's was combersome, unfair, and not the least restrictive means of advancing governmental interests while protecting the constitutional rights of protesting employees. The court noted "the possibility that a union may employ accounting techniques to mask political expenditures," a factor which has created intolerable burdens for plaintiffs in *Ellis*. *See* pp. 26-31, *supra*. *Perry* held that "a constitutionally-permissible mode of payment did not exist," and the trial court had correctly enjoined the discharge of a dissenting employee for failure to pay an agency fee. The fee was placed in escrow. 708 F.2d at 1262-63.

In *Greenfield*, the highest court of Massachusetts recognized that requiring dissenting employees to pay the entire fee to the union before its legitimacy has been proven "forces them to subsidize the objectionable activities of the organization." 385 Mass. at 84, 431 N.E.2d at 189. The

court held "that the statutory right of the organization to the permissible amount is outweighed by the potential that the impermissible amounts will be used, even temporarily, in violation of the dissenting [employees'] First Amendment rights." *Id.* at 83, 431 N.E.2d at 188. The employees may not be required to pay the fee to the union until after the chargeable amount has been adjudicated. *Id.* at 85, 431 N.E.2d at 189.

In *Robinson I*, the court endorsed *Greenfield* and its application of *Abood*. 547 F.Supp. at 1321. The defendant unions then revised their refund, or "demand and return," systems in an attempt to make them more effective and less cumbersome. However, these new systems, more sophisticated than BRAC's, still require dissenting employees to pay the full service fee[23] and then demand a refund if they are dissatisfied with the amount of the fees.

After considering these new systems, the *Robinson* court went beyond its original holding based upon the burdensomeness of the particular characteristics of the original rebate schemes. It said:

> [U]nder the very best demand and return system no objecting non-member can devote the time and money required to ascertain and, if warranted, regain the portion of his representation fee which the union may use for political and ideological purposes. The statutory requirement of a demand and return system is an illusory remedy. As a practical matter, therefore, the statute permits a union to take the funds of objecting non-members and use them for the union's own political and ideological purposes. The good faith efforts of the union defendants in these cases to create workable systems demonstrate that no demand and return system can protect an objecting non-member's First Amendment rights.

Robinson II, 113 L.R.R.M. at 3275. The court enjoined the collection of any fees until the New Jersey statute is amended "so as to include a provision for a hearing before a state tribunal on the validity of any representation fee prior to payment of the fee to the union." *Id.* at 3278; *see also Gaida v. Bloustein*, 686 F.2d at 167-69; *Beck v. CWA*, 468 F.Supp. at 97.

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[23] The New Jersey statute established a partial bar to the payment of full fees; the rebate was deducted from the amount of the service fee, which was set at 85% of union dues.

The insightful opinions in *Robinson*, echoing the prophetic dissents of Justices Whittaker and Black in *Street*, demonstrate with unmistakable clarity that the pragmatic impact of the rebate "remedy" is the exhaustion of non-members' finances and the evaporation of those rights which lie at the heart of a truly free society. It has now taken over a decade of protracted litigation at the cost of hundreds of thousands of dollars by both sides for an individual plaintiff in this case to recover a maximum rebate of $352.69 (J.A.IV 373-96). Plaintiffs' attorneys and accountants have spent thousands of hours to invalidate two of BRAC's earlier rebate procedures, expose the BRAC/AFL-CIO money laundering scheme, and confront the herculean task of attempting to unravel BRAC's chaotic accounting practices.

CONCLUSION

Because the decision of the Ninth Circuit erroneously defined the scope of union activities which the plaintiffs may be compelled to subsidize as a condition of their employment and approved a remedy which does not prevent coerced political and ideological conformity, that decision should be reversed.

Because the district court applied an erroneous burden of proof at the trial, the plaintiffs are entitled to a remand for a new trial on the issue of damages. At trial, BRAC must prove by clear and convincing evidence, in accordance with generally accepted accounting principles, that proportion of the plaintiffs' compulsory fees which has been spent for contract negotiation, contract administration and grievance adjustment with Western Airlines. Plaintiffs are entitled to damages, with interest, as to all other amounts paid.

Finally, the district court should be instructed to enter a declaratory judgment that BRAC violated the constitutional and statutory rights of plaintiffs by maintaining a rebate procedure which tolerated the payment

and use of compelled fees for statutorily and constitutionally proscribed purposes.

Respectfully submitted,

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